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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GUY MICHAEL SCOTT,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Real Party in Interest.

G057606

(Super. Ct. No. C-49826)

O P I N I O N

Original proceedings; petition for a writ of prohibition/mandate to challenge an order of the Superior Court of Orange County, Gregg L. Prickett, Judge. Petition granted.

Sharon Petrosino, Public Defender, and Deputy Public Defender Mark Kim for Petitioner.

No appearance by Real Party in Interest Todd Spitzer, District Attorney.

THE COURT:\*

Petitioner Guy Michael Scott filed a peremptory challenge to respondent court pursuant section 170.6 of the Code of Civil Procedure.<sup>1</sup> Scott contends respondent court wrongfully denied the peremptory challenge as untimely. We agree and the petition is granted.

#### PROCEDURAL FACTS

On January 7, 2019, Guy Michael Scott filed a petition for resentencing pursuant to Penal Code section 1170.95. The minute order dated February 13, 2019, states, “Court read and considered the petition filed per Penal Code Section 1170.95 for purposes of assignment and to address the appointment of counsel.” The minute order states further the “Case is assigned to Judge Gregg L. Prickett in Department C35 for purposes of the petition filed per Penal Code Section 1170.95.”

With no date scheduled for a hearing, on April 2, 2019, Scott filed a peremptory challenge to respondent court pursuant to section 170.6. On April 9, respondent court determined the peremptory challenge was untimely and filed an order that said, “After reviewing the file and this timeline, the peremptory challenge is DENIED because of a lack of timeliness.” In the order denying the peremptory challenge, respondent court referred to “CCP section 170.6, subd. (a)(3),” and the 10-day/5-day rule and the all purpose assignment rule in subdivision (a)(2) of section 170.6. Although the order denying the peremptory challenge suggested the case had been assigned to respondent court as an all purpose assignment on February 13, 2019, the docket entry on May 1, 2019, states, “The Court orders the minutes of 02/13/19 be

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\* Before Aronson, Acting P. J., Fybel, J., and Thompson, J.

<sup>1</sup> All further references are to the Code of Civil Procedure unless otherwise noted.

updated to correctly reflect the assignment to Judge Gregg Prickett, was made for all-purposes.”<sup>2</sup>

On April 19, 2019, Scott filed a petition for a writ of prohibition or mandate and a request for an immediate stay asking this court to direct respondent court to vacate the order denying his peremptory challenge and to enter an order granting the peremptory challenge. This court invited real party to file an informal response to the petition and real party “respectfully decline[d] the court’s invitation to respond informally in this matter.”

### DISCUSSION

Subdivision (a)(2) of section 170.6 pinpoints when a peremptory challenge should be made. Under the 10-day/5-day rule that respondent court referred to in the order denying Scott’s peremptory challenge, the peremptory challenge must be made “at least 5 days before” “the date set for trial or hearing.” In this case, the 10-day/5-day rule does not apply because at the time Scott filed his peremptory challenge on April 2, 2019, no hearing date had been set in order to trigger the application of the rule. (§ 170.6, subd. (a)(2).) Respondent court’s application of the all purpose assignment rule is also misplaced. Under the all purpose assignment rule the peremptory challenge must be made within 10 days after notice of the all purpose assignment “[i]f [the peremptory challenge is] directed to the trial of a criminal cause.” (*Ibid.*) Because a petition for resentencing is not “the trial of a criminal cause,” the all purpose assignment rule does not apply in this postjudgment context. (§ 170.6, subd. (a)(2).) Likewise, respondent court’s reference to subdivision (a)(3) of section 170.6 is also inapt because Scott is not “[a] party to a civil action.” He is seeking resentencing of his conviction under his original criminal case number.

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<sup>2</sup> On the court’s own motion and for good cause, the court takes judicial notice of the Register of Actions in superior court case number C-49826. (Evid.Code, §§ 452, subd. (d), 459, subd. (a).)

Because the petition for resentencing pursuant to Penal Code section 1170.95 is a postjudgment criminal proceeding, the usual pretrial rules do not apply at this stage of Scott's case. Subdivision (a)(2) of 170.6 states in relevant part, "[i]f the motion is directed to a hearing, *other than the trial of a cause*, the motion shall be made not later than the commencement of the hearing. In the case of trials or hearings not specifically provided for in this paragraph, the procedure specified herein shall be followed as nearly as possible." (Emphasis added.)

In a postjudgment proceeding where no hearing date has been set and the court has not made "a determination of contested fact issues relating to the merits," (§170.6(a)(2)) a peremptory challenge is timely if made before the commencement of the hearing, or before the court considers and evaluates the petition before granting relief. (*Maas v. Superior Court* (2016) 1 Cal.5th 962, 977.) In this case, at the time Scott filed his peremptory challenge on April 2, 2019, the challenge was timely and should have been granted by respondent court.

Although the petition did not seek a peremptory writ in the first instance and this court's request for an informal response did not cite *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171 (*Palma*), we nonetheless use the accelerated procedure in *Palma* to grant relief on the basis that real party has declined the invitation to file opposition to the petition and "petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue." (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

## DISPOSITION

Let a peremptory writ of mandate issue directing respondent court to vacate its order entered on April 9, 2019, denying petitioner's peremptory challenge made pursuant to section 170.6, and enter an order granting the peremptory challenge. In the interest of justice, the opinion in this matter is deemed final as to this court forthwith and the clerk is directed to issue the remittitur forthwith. (Cal. Rules of Court, rule 8.490(b)(2)(A).)